NO. 83-1068

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In the Supreme Court of the United States

OCTOBER TERM, 1983

LLOYD SPENCER, THE CITY OF BREAUX BRIDGE, THE POLICE DEPARTMENT OF THE CITY OF BEAUX BRIDGE, GEORGE MENARD, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE OF THE POLICE DEPARTMENT FOR THE CITY OF BREAUX BRIDGE, VERNON "SUKIT" BLANCHARD, ANTHONY "TANNY" HEBERT, JOSEPH "JOE" JONES, EARL G. HOLLIER AND RAY BROUSSARD, IN THEIR OFFICIAL CAPACITY AS COUNCILMEN FOR THE CITY OF BREAUX BRIDGE, LOUISIANA,

Petitioners

VERSUS

EULA MAE LOGAN, INDIVIDUALLY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a surviving parent has standing to sue in a Louisiana Federal District Court for damages for the alleged wrongful death of his child under 42 U.S.C. 1983, when the decedent is survived by minor children.

2. Whether a Federal court is required to adopt as federal law the Louisiana Wrongful Death Statute, L.S.A. CC Article 2315, which precludes an action by a parent when the decedent is survived by children, or whether a federal court is free to create a federal common law rule allowing the action.

3. Whether the Louisiana Wrongful Death Statute, L.S.A. C.C. Article 2315, is reasonable and generally consistent with the Constitution and laws of the United States regarding compensation for those injured by deprivation of constitutional rights.

4. Whether there is a constitutionally protected parental right to the continued life of an offspring.

LIST OF INTERESTED PARTIES

The only other parties not listed in the caption are the plaintiff, Eula Mae Logan, as administratrix of the Succession of Glenda John Louis, and as administratrix of the estate of her minor grandchildren, Joseph Anthony Edmond, Cintrella Fay Edmond, Kelly Renee John Louis, Latasha Tranice John Louis, and Sudaniel James John Louis; and an additional defendant, Officer Dan Hollier. The additional parties plaintiff are represented by the same counsel representing Eula Mae Logan individually. Officer Dan Hollier is represented by Mr. James L. Pate of Onebane, donahoe, Bernard, Torian, Diaz, McNamara & Abell, P.O. Drawer 3507, Lafayette, Louisiana 70502.

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LLOYD SPENCER, THE CITY OF BREAUX BRIDGE, THE POLICE DEPARTMENT OF THE CITY OF BEAUX BRIDGE, GEORGE MENARD, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE OF THE POLICE DEPARTMENT FOR THE CITY OF BREAUX BRIDGE, VERNON "SUKIT" BLANCHARD, ANTHONY "TANNY" HEBERT, JOSEPH "JOE" JONES, EARL G. HOLLIER AND RAY BROUSSARD, IN THEIR OFFICIAL CAPACITY AS COUNCILMEN FOR THE CITY OF BREAUX BRIDGE, LOUISIANA,

Petitioners

VERSUS

EULA MAE LOGAN, INDIVIDUALLY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners; Lloyd Spencer, the City of Breaux Bridge, the Police Department of the City of Breaux Bridge, George Menard, in his official capacity as Chief of Police of the Police Department for the City of Breaux Bridge, Vernon "Sukit" Blanchard, Anthony "Tanny" Hebert, Joseph "Joe" Jones, Earl G. Hollier and Ray Broussard in their official capacity as Councilmen for the City of Breaux Bridge, Louisiana; respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the United States

Court of Appeals for the Fifth Circuit entered on August 11, 1983 and the Judgment and Opinion of the United States District Court for the Western District of Louisiana entered on October 18, 1983.

OPINIONS BELOW

The Opinion and Judgment of the Court of Appeals vacating the original Judgment of the District Court in favor of petitioners, and remanding the case to the District Court, appears in Appendix "A" to this Petition, and is reported at 711 F.2d 690. The Order of the Court of Appeals denying a Petition for Re-hearing appears in Appendix "B". The original Memorandum Opinion and Order of the District Court appears in Appendix "C" and is not reported. The original Judgment of the District Court appears in Appendix "D". The memorandum Opinion and Order of the District Court after the remand appears in Appendix "E" and is not reported.

JURISDICTION

The Judgment of the Court of Appeals (Appendix "A") was entered on August 11, 1983. A timely Petition for Re-hearing was denied on September 26, 1983 (Appendix "B"). The judgment of the district court after remand was entered on October 18, 1983 (Appendix "E"). The jurisdiction of this court is invoked under 28 USC, §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. 1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage of any

State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1988 provides:

"The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States and their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, insofar as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and statutes of the State wherein the Court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, the infliction of punishment on the party found guilty."

La. Civ. Code Article 2315 provides:

"Liability for acts causing damage; surivial of action.

Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person.

The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover the damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

As used in this article, the words "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father, and mother, by adoption, respectively."

STATEMENT OF THE CASE

This is an action seeking damages of Ten Million Dollars allegedly resulting from the death of Glenda Jean Louis under 42 U.S.C. §1983 and §1985. The complaint was brought by Louis' mother, Eula Mae Logan, individually and as administratrix of the decedent's estate, and further, on behalf of the five surviving children of Ms. Louis. It is the claim of Eula Mae Logan in her individual capacity for damages under federal law for the alleged wrongful death that is at issue on this application.

In her original complaint, Eula Mae Logan prayed for judgment, in solido, against the City of Breaux Bridge, the Breaux Bridge Police Department, two police officers of the City of Breaux Bridge[1] and XYZ Insurance Company, under the cited authority of the United States Constitution, Federal Civil Rights Act and Louisiana law. The complaint was later amended to name as defendants members of the Breaux Bridge City Council and the Chief of Police of the Breaux Bridge Police Department.

The complaint of Eula Mae Logan alleges that Glenda Jean Louis was shot and fatally wounded while attending a political rally at Percy Perry's Lounge in Breaux Bridge, Louisiana. The fatal shot was allegedly fired by police officers of the City of Breaux Bridge, who were attempting to investigate a fight and quiet a disturbance at the premises. The complaint, as amended, avers that the City of Breaux Bridge, the Breaux Bridge Council members, and the Breaux Bridge Chief of Police were

[1] Officer dan Hollier is represented by separate counsel, Mr. James L. Pate, of Onebane, Donahoe, Bernard, Torian, Diaz, McNamara & Abell, Lafayette, Louisiana.

grossly negligent in pursuing a policy of appointing and permitting the appointment of unqualified persons as police officers, and failing to provide adequate training, supervision and discipline for police officers.

It is undisputed that Glenda Jean Louis was survived not only by her mother, Eula Mae Logan (respondent), but by five minor children, who have also asserted substantial damage claims in these proceedings. Therefore, petitioners moved to dismiss the individual claim of Eula Mae Logan for wrongful death damages, mental anguish, loss of love, society and affection on the ground that she was not a proper party in interest and that her claim was preempted by that of a preferred class of beneficiaries, the minor children of Glenda Jean Louis. The District Court granted petitioners' Motion and dismissed Ms. Logan's claim under both federal and state law (Appendic "C"). After granting Ms. Logan's Motion for Reconsideration and after a second hearing on the Motion to Dismiss, the District Court affirmed its prior decision. On February 22, 1982, judgment was signed pursuant to Federal Rules of Civil Procedure 54(b), dismissing the complaint of Eula Mae Logan, individually. (Appendix "D"

Thereafter, Ms. Logan appealed to the Untied States Court of Appeals for the Fifth Circuit, only with respect to the dismissal of her claim under federal law. On August 11, 1983, the Court of Appeals rendered its judgment vacating the decision of the District Court and remanding the case for a decision consistent with its opinion (Appendix "A"). Petitioners timely applied for a rehearing with the Court of Appeals, which was denied on September 26, 1983 (Appendix "B"). The District Court subsequently issued a memorandum ruling dated October 18, 1983, reversing its prior ruling and denying petitioner's Motion to Dismiss the

claim of Eula Mae Logan (Appendix "E").

REASONS FOR GRANTING THE PETITION

This case presents the important question of the circumstances under which a plaintiff who claims that his constitutional rights have been violated has standing to bring an action under 42 U.S.C. §1983, and the extent to which appropriate federal remedies may be shaped by reference to State law. Petitioners suggest that the lower Court rulings will open the floodgates to federal court litigation of claims by distant surviving relatives who claim that some implied constitutional right of family has been violated by the death of another person.

Under the laws of the United States, a party who is injured by virtue of the deprivation of his own constitutional rights may being an action for redress. 42 U.S.C. §1983. However, the Civil Rights Act does not state in detail the circumstances under which a person has standing to recover damages for the deprivation of another person's right. Therefore, in an action by a survivor for his own damages brought undaer the Federal Civil Rights Act, 42 U.S.C. §1988 mandates that the law of the forum state be applied to fill in the gaps in federal law, so long as state law is not in general inconsistent with federal law and policy. In this case, Eula Mae Logan cannot show that she was sufficiently affected by the death of her daughter to have the requisite standing to pursue this action, since Louisiana law prohibits an action by a surviving parent when the decedent is survived by issue or a spouse. Moreover, petitioners suggest that Ms. Logan has sustained no direct deprivation of her own constitutional rights.

It is undisputed that Eula Mae Logan has no right of

action under state law, since under Louisiana law, when there are surviving children, the decedent's surviving father or mother is precluded from recovering any damages he or she may have sustained from the decedent's wrongful death. L.S.A. CC. Art. 2315[2], *Roche v. Big Moose Oil Field Truck Service*, 381 So.2d 396 (La. 1980); *LaBorde v. Eagle Truck Company*, 409 So.2d 1266 (La. App. 2d Cir. 1982).

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[2] Art. 2315 provides:

"Liability for acts causing damage; survival of action.

Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person.

The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover the damages under the provisions of this paragraph is a property right which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

Therefore, unless federal law grants a right of action and provides a remedial mechanism broader than the state provisions to remote surviving relatives of a decedent, Eula Mae Logan cannot prosecute this action for her individual damages under federal law.

The federal law upon which Eula Mae Logan predicates her claim is contained in 42 U.S.C. §1983 and provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen...to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Section 1983 makes no mention of whether and under what circumstances a third person damaged by the death of another individual in violation of §1983 has standing to claim those damages. Section 1983 grants in general terms a broad right to relief, but does not address the details of suitable remedies within the context of the numerous actions that might be pursued under its terms. Section 1988 of Title 42 recognizes that in certain cases, "federal law is unsuited or insurricient to furnish suitable remedies" and simply does not "cover every issue that may arise in the context of the Federal Civil Rights Act." *Moor v. County of Alameda*, 411 U.S. 693 S.Ct. 1785 36 L.Ed.2d 596 (1973). Section 1988 provides in pertinent part:

(Footnote 2 continued)

> As used in this article, the words "child", "brother", "sister", "father", and "mother" include a child, brother, sister, father, and mother, by adoption, respectively."

> "The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States and their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, insofar as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the Constitution and statutes of the State wherein the Court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, the infliction of punishment on the party found guilty."

When federal law is thus deficient, §1988 requires that a Court look to the common law, as modified and changed by the constitution and laws of the forum state, so long as these are not inconsistent with the Constitution and laws of the United States. *Robertson v. Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978). This Court recognized in *Robertson v. Wegmann, supra*, that a state statute cannot be considered inconsistent with federal law merely because the state statute causes the plaintiff to lose the litigation. Petitioners submit that the Louisiana wrongful death statute must be applied under §1988 as the appropriate remedial vehicle to effectuate the policies of §1983 and federal constitutional law and that the state statute is reasonable and consistent with federal law and policy.

This Court squarely faced these issues in *Robertson v. Wegmann, supra.* There, the original plaintiff had commenced an action for damages under 42 U.S.C. §1983, but had died before trial. The executor of his estate was substituted as party plaintiff and the defendant moved to dismiss the action on the ground that it had abated on the death of the original plaintiff. This Court phrased the issue as being whether it was required to adopt as federal law the Louisiana survivorship statute, which would have caused the action to abate, or was free instead to create a federal common law rule allowing the action to survive. Noting that the resolution of the issue turned on whether the state statute was inconsistent with the Constitution and laws of the United States, the Court applied state law, although state law caused the action to abate.

The Court reasoned:

> "As both courts below held, and as both parties here have assumed, the decision as to the applicable survivorship rule is governed by 42 U.S.C.A. §1988 [42 U.S.C.S. §1988]. This statute recognizes that in certain areas, 'federal law is unsuited or insufficient to furnish suitable remedies'; federal law simply does not 'cover every issue that may arise in the context of a federal civil rights action.' *Moor v. County of Alameda*, 411 U.S. 693, 703, 702, 36 L.Ed.2d 596, 93 S.Ct. 1785 (1973), quoting 42 U.S.C. §1988 [42 U.S.C.S. §1988]. When federal law is thus 'deficient,' §1988 instructs us to turn to 'the common law, as modified and changed by the Constitution and statutes of the [forum] state,' so long as these are 'not inconsistent with the Constitution and laws of the United States.'"

* * * *

It is true that §1983 provides 'a uniquely federal remedy against incursions under the claimed authority of state law, of rights secured by the Constitution and laws of the nation.' *Mitchun v. Foster, supra,* at 239, 32 L.Ed.2d 705, 92 S.Ct. 2152. That a federal remedy should be available, however, does not mean that a §1983 plaintiff (or his representative) must be allowed to continue an action in disregard of the state law to which §1988 refers us. A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the §1983 action were the only benchmark, there would be no reason to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But §1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby. Under the circumstances presented here, the fact that Shaw was not survived by one of several close relatives should not itself be sufficient to cause the Louisiana survivorship provisions to be deemed 'inconsistent with the Constitution and laws of the United States.' 42 U.S.C. §1988 [42 U.S.C.S. §1988]." 56 L.Ed.2d at p. 560, 563

The courts below determined that the *Robertson v. Wegmann* decision was not analagous since it dealt with the survival action and not with the death action. Petitioners contend that the lower courts thus failed to give proper weight and authority to this Court's holding that State law must be used to fashion a remedy for constitutional deprivations, so long as state law is not inconsistent with the purposes behind the Constitution and laws of the United States.

Although neither this Court nor any Circuit Court of Appeals has previously addressed the question squarely in the context of a wrongful death claim, several federal district courts have dealt with the issue. The majority of those courts have relied on state law to determine whether a plaintiff has standing to sue for his own damages resulting from the death of another. Indeed, those decisions are significant because these lower courts have had difficulty not with the question of whether the remedial vehicle is provided by reference to state law (adopted as federal law pursuant to §1988), but the question of whether a survivor has a federally enforceable claim in his own right at all.

For example, in *Smith v. Wickline*, 396 F.Supp. 555 (N.D. Ill. 1975), the parents of a child who was allegedly killed as a result of being unjustifiably shot brought suit against state police officers and the chief of police for deprivation of constitutional rights secured to them individually. The defendants argued that under §1983, a parent had no standing to sue for the deprivation of the civil rights of a child. The plaintiffs responded that §1988 authorized resort to state law and that the Oklahoma statutes created a cause of action for wrongful death for the next of kin of the decedent. The district court concluded that resort to the remedy found in the state wrongful death statutes was appropriate and necessary to effectuate the policies of the Civil Rights Act. Significantly, the court stated at footnote 3 of its decision, that the parents were appropriate plaintiffs only because the minor child died leaving no issue or surviving spouse.

The federal district courts have consistently found a right of action in the survivor for his or her own damages only when the applicable state law so allows. In *Pollard v.*

United States, 384 F.Supp. 304 (M.D. Ala. 1974), the court disposed of the question of whether the plaintiff survivors were proper parties to sue for their own damages resulting from the wrongful death of their decedents, stating:

> "Since there is no express federal remedy for wrongful death under the Civil Rights Statutes (42 U.S.C. §1981, 1983, 1985), the common and statutory law of the state of Alabama must be looked to for a suitable remedy not inconsistent with the Constitution and laws of the United States. 42 U.S.C. §1988. An action against these state defendants for the violations of the Civil Rights Statutes gives rise, by virtue of Alabama's wrongful death statute, to federally enforceable claims for damages by their personal representatives. *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961), cited with approval in *Moor v. County of Alameda*, 411 U.S. 693, 702-703, note 14, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973)."

Similarly, in *Galindo v. Brownell*, 255 F.Supp. 930 (S.D. Cal. 1966), the court concluded that the deceased minor's mother had standing to sue for her own damages resulting from his death, by virtue of the California wrongful death statutes which allowed such an action.

The cases cited by Eula Mae Logan and upon which she relied in the courts below also recognize the distinction between an invasion of a constitutionally protected right and standing to bring an action under remedial provisions of state law, applied pursuant to §1988. In *Mattis v. Schnarr*, 502 f.2d 588 (8th Cir. 1974), a father whose son had been shot and killed while attempting to escape arrest brought an action against police officers for his own damages resulting from the death. The trial court had

initially held that the plaintiff had standing to bring the action under Title 42 U.S.C. §1983. It reasoned that the section did not create a new cause of action in favor of the person for the wrongful death of another, but that §1988 of the same title authorized resort to state law to determine whether the cause of action survives to the wrongful death of another. This Court futher reasoned that since Missouri law permitted the father to bring a wrongful death action for an unmarried minor son, the father had standing to bring the action.

Agreeing with the trial court's initial decision, the Court of Appeals stated:

> "The critical issue then is whether the plaintiff had standing. We believe the trial court's initial views on this matter were the correct ones. There are two aspects to this question: (1) the party seeking relief must show that he is sufficiently affected by the action he is challenging to justify consideration by the court of the validity of the action; and (2) the action violates the rights of a particular party who is attacking it and not of some third party. Sedler, standing to Assert Constitutional Jus Tertii in the Supreme Court, 71 L.J. 599-600 (1962).
>
> We believe the plaintiff showed that he would be sufficiently affected by the killing of his son to justify the courts considering the matter. The Missouri wrongful death Act (V.A.M.S. 6537.080) creates a vested right in the plaintiff to bring suit for the death of his minor son.
>
> * * * *
>
> Thus, it is clear that Dr. Mattis is an injured party under §1983, that he is suing in his own right for injuries personally sustained, and that he is

sufficiently affected by the action challenged to fulfill the first aspect of standing." 502 F.2d at 593

Only after thus answering the question of standing in the affirmative did the court turn to what it considered the more difficult question of whether the killing of petitioner's son invaded the petitioner's constitutionally protected rights, i.e., the right of parenthood. See also the case of *Bell v. City of Milwaukee*, 498 F.Supp. 1339 (E.D. Wis. 1980), which relied on *Mattis v. Schnarr, supra*, to hold that a §1983 action may be based on the death of a relative *if* the relevant state wrongful death statute would permit such an action.

Thus, the lower courts erred in two respects. Those courts failed to consider whether state law indicated that a parent was sufficiently affected by the death of a child who is survived by descendents to justify consideration of the claim. Secondly, the lower courts erroneously concluded that Ms. Logan's own constitutional rights were in fact violated.

In this regard, the lower courts misconstrued this Court's prior decisions in *Meyer v. State of Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923) and *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) to find that Eula Mae Logan had standing because of the alleged violation of her constitutional right of parenthood.

Those cases stand only for the proposition that the right to raise a child is a constitutionally protected right, free from state regulation and intrusion into that private sphere. Eula Mae Logan lost a child; she was not deprived of the "right to parenthood."

While the distinction at first glance may appear to be unimportant, it is indeed quite significant. For example, extending the lower courts' reasoning to its logical extreme would allow a parent to bring a habeas corpus action on behalf of a major offspring illegally convicted and in prison. Certainly, 42 U.S.C. §1983 was never intended to authorize such an action. In that circumstance as in this case, the parents' alleged right to the companionship of family and child would be indirectly affected. Nevertheless, the right of parenthood within the meaning of this court's decisions would not be infringed and it is suggested that only the child, who suffered the direct loss of liberty, should be allowed to bring an action.

A recent federal district court decision, *Jackson v. Marsh*, 551 F.Supp. 1091 (D. Colo. 1982) illustrates this distinction. In that case, the court addressed the question of whether there is a constitutionally protected parental right to the continued life of an offspring. In finding that there was no cognizable claim under §1983, the court stated:

> "In my judgment, the parental or family right with which we deal is simply a right to be free from pervasive, broadly focused governmental activity directed at the family unit in the community as a whole or applicable to all families within the purview of the governmental entity. Conversely, the Supreme Court has never addressed, nor has it created, a right of a constitutional magnitude which protects individuals from particular acts of governmental agents focusing upon specific family members and potentially affecting the continuity of the intra-family relationship.

> Individuals who have been subject to those acts are not without redress; however, as I see their right, it is not one protected by the United States Constitution in a manner which would make it cognizable under §1983. In short, any right arising out of facts such as those before me in this case must be pursued in state court." 551 F.Supp. at 1094.

Therefore, the lower courts' decisions go well beyond the scope of this court's prior opinions concerning the right of parenthood and to raise a family, thereby leaving open the possibility of an influx of claims by remote surviving relatives. Obviously, in our country, there are many rights emanating from the privacy of the family unit, but this does not mean that every person who is deprived of a relative or close friend by virtue of his wrongful death is entitled to recover damages therefor. The question is not only whether constitutionally protected rights are invaded, but whether, and under what circumstances, the potential plaintiff has standing to bring the action. This gap in federal law must be filled by state law in order to effectuate the policies of the Federal Civil Rights Act.

Finally, petitioners suggest that this court has previously recognized the paramount importance of the issues presented in this petition for a writ of certiorari in the case of *Jones v. Hildebrandt*, 432 U.S. 183, 97 S.Ct. 2283, 53 L.Ed.2d 209 (1977). There, a mother brought an action in a Colorado state court after her 15-year-old son had been shot and killed by a police officer, asserting state claims and a claim for deprivation of her own federal constitutional rights under 42 U.S.C. §1983. This court granted certiorari to consider the question of whether a state's limitation on damages in a wrongful death statute would control in an action brought pursuant to §1983.

The court discovered for the first time in oral argument that the mother's claim was based on the alleged infringement of the mother's right to raise her child without interference from the state. Since the mother's claim was not set forth in the complaint or mentioned in the lower court's brief, the writ of certiorari was dismissed as improvidently granted.

Nonetheless, the decision of the majority as well as the dissent confirms that this Court has never had an occasion to determine the crucial underlying question, whether a parent is deprived of a constitutional interest as a result of the killing of a child. The dissent of Justices White, Brennan, and Marshall further states: "These issues are important and we should decide them." 53 L.Ed.2d at 219.

Acceptance of this Application for Writ of Certiorari will allow this court to consider this important issue in the context of a case which is in the correct procedural posture for a decision. In summary, this Court has already recognized that the issues presented by this case warrant the exercise of its supervisory jurisdiction. This case presents an opportunity for determination of those issues.

CONCLUSION

This Petition for a Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED,

R. Gordon Kean, Jr.
Charles S. McCowan, Jr.
Pamela C. Walker
KEAN, MILLER, HAWTHORNE,
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CERTIFICATE OF SERVICE

I, Charles S. McCowan, Jr., one of the counsel for petitioners, and a member of the Bar of the Supreme Court of the United States, hereby certify, that on the _____ day of December, 1983, I served three copies of the Petition for a Writ of Certiorari on each of the several parties hereto, as follows:

1. On respondent, Eula Mae Logan, Individually, by mailing three copies in a duly addressed envelope, with first class postage prepaid, to each of her respective counsel of record:

Eugene Barriffe, Jr.
Mary Anne Mumme
215 South Broad Street
New Orleans, LA 70119

2. On defendant, Dan Hollier, by mailing three copies in a duly addressed envelope, with first class postage prepaid to his counsel of record:

James L. Pate
Southwest National Bank Building
Suite 700
102 Versailles Boulevard
P.O. Drawer 3507
Lafayette, LA 70502

It is further certified that all parties required to be served have been served, and that the list of such parties

is as set forth above.

Charles S. McCowan, Jr., Attorney for defendants, Dan Hollier, Lloyd Spencer, The City of Breaux Bridge, The Police Department of the City of Breaux Bridge, George Menard, Vernon "Sukit" Blanchard, Anthony "Tanny" Hebert, Joseph "Joe" Jones, Earl G. Hollier and Ray Broussard,
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APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3172

D. C. Docket NO. CA-81-0559-S

EULA MAE LOGAN, etc., ET AL.,

Plaintiff-Appellant,

versus

DAN HOLLIER, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

Before GARZA, POLITZ and JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said district Court in this cause be, and the same is hereby, vacated; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this COurt;

The judgment entered provides that each party bear its own costs on appeal.

August 11, 1983

ISSUED AS MANDATE: Oct. 6, 1983

A-3

Eula Mae LOGAN, etc., et al.,

Plaintiff-Appellant,

v.

Dan HOLLIER, et al.,

Defendants-Appellees.

No. 82-3172

United States Court of Appeals
Fifth Circuit.

Aug. 11, 1983

Mother filed wrongful death suit individually, as administrator of succession of her daughter, and on behalf of her daughter's five minor children. Mother invoked both statute governing deprivation of civil rights and Louisiana wrongful death statute. The United States District Court for the Western District of Louisiana, John M. Shaw, Jr., dismissed mother's individual claims pursuant to Louisiana statute which provides that mother of decedent is preempted from filing wrongful death action if decedent is survived by child, and mother appealed. The Court of Appeals, Politz, Circuit Judge, held that district court's dismissal would be vacated and remanded for determination of whether mother had cognizable claim under civil rights statute and Constitution for wrongful death of her daughter independent of Louisiana wrongful death statute.

Vacated and remanded.

Appeal from the United States District Court for the Western District of Louisiana.

Before GARZA, POLITZ and JOHNSON, Circuit Judges.

POLITZ, Circuit Judge:

Eula Mae Logan filed this wrongful death suit individually, as administrator of the succession of her daughter Glenda Jean Lewis, and on behalf of her deceased daughter's five minor children. Named as defendants were the City of Breaux Bridge, Louisiana, its Police Department, Police Chief, and Council Members, unidentified insurers, and two police officers, Dan Hollier and Lloyd Spencer. Plaintiff invoked 42 U.S.C. § 1983 and Louisiana Civil Code article 2315.

The defendants moved for dismissal of Logan's individual claims. While conceding the correctness of the motion to dismiss the Louisiana law claim, Logan challenges the dismissal of her individual claim under § 1983. The district court dismissed that claim pursuant to Civil Code article 2315 which prescribes that the mother of a decedent is pre-empted from filing a wrongful death action if the decedent is survived by a child. The district court was of the view that the hierarchy of beneficiaries in Louisiana's wrongful death statute applied to the § 1983 claim. Applying that statutory scheme, the district court concluded that Logan had no standing to sue and no entitlement to assert a § 1983 deprivation.

We vacate and remand for the determination by the district court whether Logan has a cognizable claim under § 1983 for the injury to her constitutionally protected

liberty interest in parenthood, separate and apart from the state law created wrongful death action. We express no opinion as to the ultimate resolution of this inquiry. It should, however, be apparent from our decision today that we view the question as a serious one. In that light we share a few observations.

The courts have long recognized that the Constitution protects the family and basic familial relationships and practices. Cases have involved, *inter alia*, religious freedoms, education and upbringing of children, living patterns, and reciprocal rights of parents and children. The recognition of constitutional rights associated with the family and its members began with *Meyer v. Nebraska*, 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042 (1923), and has continued through a long line of cases, including *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Prince v. Massachusetts*, 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645 (1944); *Levy v. Louisiana*, 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436 (1968); *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441 (1968); *Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972); and *Moore v. City of East Cleveland*, 431 U.S. 494, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977).

In *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972), Justice White spoke to the relationship betwen parent and child in ringing tones:

> It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children "come[s] to this Court with a momentum for respect lacking when an appeal is made to liberties which derive merely from

shifting economic arrangements." (Citations omitted.)

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed "essential," *Meyer v. Nebraska*, 262 US 390, 399, 67 L.Ed. 1042, 1045, 43 S.Ct. 625 [626], 29 ALR 1446 (1923), "basic civil rights of man," *Skinner v. Oklahoma*, 316 US 535, 541 86 L.Ed. 1655, 1660, 62 S.Ct. 1110 [1113] (1942), and "[r]ights far more precious...than property rights," *May v. Anderson*, 345 US 528, 533, 97 L.Ed. 1221, 1226, 73 S.Ct. 840 [843] (1953).... The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska*, supra [262 U.S.] at 399, 67 L.Ed. at 1045 [43 S.Ct. at 626] the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma*, supra [316 U.S.] at 541, 86 L.Ed. at 1660 [62 S.Ct. 1110, 1113], and the Ninth Amendment, *Griswold v. Connecticut*, 381 US 479, 496, 14 L.Ed.2d 510, 522, 85 S.Ct. 1678 [1688] (1965) (Goldberg, J., concurring).

We perceive as particularly pertinent to the resolution of the instant inquiry, the opinion in *Jones v. Hildebrandt*, 432 U.S. 183, 97 S.Ct. 2283, 53 L.Ed.2d 209 (1977). Though the guidance it offers is not dispositive, the language is instructive. The opinion suggests the possibility that a parent's claim for the wrongful death of a child under § 1983 may have an existence quite apart from the state's wrongful death provision.

Accordingly, we VACATE and REMAND for the district court to determine whether Eula Mae Logan has a cause of action under the Constitution and § 1983 for the wrongful death of her daughter Glenda Jean Lewis, independent of the Louisiana wrongful death statute.

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-3172

EULA MAE LOGAN, As Administratrix of the succession of Glenda Jean-Lewis, and as Administratric of the estate her minor grand-children, JOSEPH ANTHONY EDMOND, CANTEELIA FAYE EDMOND, KELLY RENE JEAN-LEWIS, LATASHA TRINESE JEAN-LEWIS and DANIEL JAMES JEAN-LEWIS,

Plaintiff-Appellant,

versus

DAN HOLLIER, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

---

ON PETITION FOR REHEARING

(SEPTEMBER 26, 1983)

Before GARZA, POLITZ and JOHNSON, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the

same is hereby denied.

ENTERED FOR THE COURT:

/S/ HENRY A. POLITZ
United States Circuit Judge

APPENDIX "C"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

EULA MAE LOGAN, ET AL

VS. CIVIL ACTION NUMBER 810559

DAN HOLLIER, ET AL SECTION S

MEMORANDUM OPINION

Plaintiffs, Eula Mae Logan, individually, and on behalf of her minor grandchildren, allege deprivation of federal civil rights and damages under Louisiana law caused by the fatal shooting of Mrs. Glenda Jean Lewis at a political rally in Breaux Bridge, Louisiana. Defendants' Motion to Dismiss Eula Mae Logan's individual claim for damages she sustained by the death of her daughter, Glenda Jean Lewis, came on for hearing and was granted by this Court, October 20, 1981.

The individual survival and wrongful death claim under 42 U.S.C. §§ 1983, 1985, LSAC.C. art. 2315 were dismissed, as these claims survived in favor of Glenda Jean Lewis' minor children under Louisiana survivorship statutes. *Brazier v. Cherry*, 293 F.2d 401 (5th Cir. 1961); *Robertson v. Wegmann*, 436 U.S. 584, 98 S.Ct. 191, 56 L.Ed.2d 554 (1978). Eula Mae Logan's individual claim for the constitutional deprivation of her right to parenthood must also fall under the state wrongful death statute, which, consistently with federal law, grants standing to sue under § 1983 for damages caused by the death of a family member to those most aggrieved by the death. See,

Mattis v. Schnarr, 502 F.2d 588 (8th Cir. 1974); *Bell v. City of Milwaukee* (E.D. Wisc. 1980). Because Glenda Jean Lewis's minor children, beneficiaries of the first class under LSA-C.C. art. 2315, were alive at the time of her death, Eula Mae Logan, a second class beneficiary, is foreclosed from raising any claim for damages under 42 U.S.C. §§ 1983, 1985, caused by the death of her daughter.

Opelousas, Louisiana, April 6, 1982.

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

APPENDIX "D"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

EULA MAE LOGAN — CIVIL ACTION NO.: 81-0559

VERSUS — DIVISION "S"

DAN HOLLIER, ET AL — ORDER FOR FINAL JUDGMENT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDDURE 54(b)

Defendants, Dan Hollier, Lloyd Spencer, the City of Breaux Bridge; George Menard, in his official capacity as Chief of Police of the Police Department of the City of Breaux Bridge; Vernon Blanchard, Anthony Hebert, Joseph James, Earl G. Hollier and Ray Broussard, in their official capacity as Councilmen for the City of Breaux Bridge; having moved for an order pursuant to Rule 12 of the Federal Rules of Civil Procedure to dismiss the claims of Eula Mae Logan; the Court having heard the arguments of counsel;

IT IS ORDERED that defendants' motion to dismiss for failure to state a claim upon which relief can be granted as to the complaintant, Eula Mae Logan, is hereby granted, and that the Clerk of this Court enter a final judgment upon the order herein, dismissing the complaint of Eula Mae Logan, and the undersigned expressly determines that there is no just reason for delay in the entry of a final judgment on this order.

JUDGMENT RENDERED the 16th day of February, 1982.

JUDGMENT SIGNED in Opelousas, Louisiana, 22 day of February, 1982.

/S/ JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

APPENDIX "E"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

EULA MAE LOGAN, ET AL

VS. CIVIL ACTION NUMBER 810559

DAN HOLLIER, ET AL SECTION S

RULING

The question to be decided on remand is whether the plaintiff has a cause of action under the Constitution and section 1983 for the injury to her liberty interest in continued parenthood, separate and apart from the state law created wrongful death action. The background and details are set out fully in the opinion of the appellate court.

This question was recently considered by Judge Moore of the United States District Court in Colorado in the case of *Jackson v. Marsh*, 551 F.Supp. 1091 (1982). Therein the Court stated that the seminal inquiry is whether there is indeed a constitutionally protected parental right to the continued life of an offspring. In finding that there was no cognizable claim under section 1983, the Court stated;

> "In my judgment, the parental or family right with which we deal is simply the right to be free from pervasive, broadly-focused governmental activity directed at the family units in the community as a whole or applicable to all families within the purview of the governmental entity.

> Conversely, the Supreme Court has never addressed, nor has it created, a right of a constitutional magnitude which protects individuals from particular acts of governmental agents focusing upon specific family members and potentially affecting the continuity of the intrafamily relationship.
>
> "Individuals who have been subjected to those acts are not without redress; however, as I see their right, it is not one protected by the United States Constitution in a manner which would make it cognizable under § 1983. In short, any right arising out of facts such as those before me in this case must be pursued in state court."

The Colorado district court considered basically the same Supreme Court decisions that the Fifth Circuit feels will provide some guidance in the resolution of the issue. The Fifth Circuit, and rightly so, has recognized the question as a serious one requiring a determination by this Court whether the plaintiff has a cause of action under the Constitution and section 1983, independent of the Louisiana wrongful death statute.

In *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), Mr. Justice McReynolds, in an opinion holding invalid a Nebraska statute forbidding the teaching of any subject in any language but English in any private, parochial or public school, defined the word "liberty" protected by the due process clause as follows:

> "While this court has not attempted to define with exactness the liberty thus guaranteed [Fourteenth Amendment guarantee against deprivation of life, liberty, or property without due process of law], the term has received much consideration,

and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, *to acquire a home and bring up children*, to worship God according to the dictates of his own conscience, and generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.***"

At the time, *Meyer v. Nebraska* may have been considered by some to evidence a broadened conception of the term "*liberty*" but it is as valid today as it was then.

There is an abundance of law recognizing the importance of the family and it goes without saying that the loss of an offspring, minor or major, has a devastating effect on a parent. It is also a safe argument that in some instances losses less tragic caused by state action and secured by the Constitution have been actionable under section 1983. Here, the alleged state action does not merely regulate the relationship—it terminates the relationship.

At common law, an action did not lie for the recovery of damages for wrongful death or the survival of previous torts. *Higgins v. Butcher,* Yelverton 90, 80 Eng. Rep. 61 (K.D. 1606); Prosser, *Law of Torts,* 4th Ed. 1971, p. 898. Therefore, an action for wrongful death was certainly not a right or privilege recognized at common law as essential to the orderly pursuit of happiness by free men. These harsh rules have now been abrogated, wholly or largely, in every common law jurisdiction. Today all American states have adopted legislation modeled more or less on Lord Campbell's Act, 9 § 10 Vic. c. 93 (1846) providing a right of action for wrongful death to certain named beneficiaries.

Unlike a survival statute, a wrongful death statute creates an independent cause of action. The plaintiff herein has no right of action under Louisiana's wrongful death statute because the decedent is survived by a child. Section 1983 is not itself a source of substantive rights. It provides a remedy only and the substantive right must be found in the "Constitution and Laws". *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600 (1979). There is no federal tort wrongful death statute applicable herein. Therefore, the substantive right for wrongful death must be secured by the Constitution before section 1983 can provide the remedy, "for §1983 by itself does not protect anyone against anything." *Chapman* at 617. The question unanswered by the Supreme Court in *Jones v. Hilderbrant*, 432 U.S. 183, 97 S.Ct. 2283, 53 L.Ed.2d 209 (1977) is whether the plaintiff was deprived of a constitutional liberty interest separate and apart from a state wrongful death action.

The Supreme Court has cautioned against a reading of the Fourteenth Amendment that would make it a font of tort law to be superimposed upon whatever systems may already be administered by the states. "We have noted the 'constitutional shoals' that confront any attempt to derive from Congressional civil rights statutes a body of general federal tort law". *Paul v. Davis*, 424 U.S. 693, 701 (1976). Yet *Paul* also made it clear that other interests are protected, not by virtue of their recognition by the law of a particular state, but because they are guaranteed in one of the provisions of the Bill of Rights which has been incorporated into the Fourteenth Amendment.

The constitutionally protected liberty interest in parenthood recognized by the Supreme Court involved rights and duties of parents in relationships with their

minor children being infringed upon by the state. In cases of death of minor children (and under certain circumstances major children), Louisiana has provided a wrongful death action. The plaintiff is claiming damages for loss of parenthood caused by the wrongful death of her major child. Although some may urge that an action for wrongful death by any other name is still an action for wrongful death, and the action was never recognized at common law, to say that parenthood is not a constitutionally protected liberty interest would in this Court's opinion violate a principle of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental." To hold that this particular liberty interest, important as it is, would not afford a substantive right under the Constitution would require a strained construction. The Court feels that the denial of this right to this plaintiff does violate those principles of liberty and justice which lie at the base of all our civil and political institutions.

The connection between parent and child is sufficiently vital to merit constitutional protection in appropriate cases. In the vast majority of cases, state law determines the final outcome but in some cases the Constitution supersedes state law and provides even greater protection for certain formal family relationships. It is clear that since the Court has held on several occasions that a parent has a constitutional right to raise his child and that this child cannot be taken from him without due process of law, a sound argument can be made that the parent herein was deprived of an equal or more important right as a result of the wrongful death. If the enduring relationship between parent and child is also protected [aside from the rights and duties that exist during the child's minority] it can hardly be said that as the relationship becomes more enduring after the child reaches majority,

the Constitutional protection disappears, because true due process does not allow cutting off any protection of family rights at the first convenient boundary. In view of the above and the assumption that the deprivation of federal rights which cause death could not be lost if based on state law which happens to provide no remedy, the Court must consider whether section 1983 actually provides a remedy. In *Robertson v. Wegmann*, 436 U.S. 584 (1978), the Court stated:

> "It is true that § 1983 provides 'a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation.' *Mitchum v. Foster, supra*, at 239. That a federal remedy should be available, however, does not mean that a § 1983 plaintiff (or his representative) must be allowed to continue an action in disregard of the state law to which § 1988 refers us. A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But § 1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby.***"

However, the Court noted in *Robertson*, at page 594, that a different situation might well be presented if state law did not provide for survival of any tort action or if it significantly restricted the types of actions that survive, and that it intimated no view about whether abatement

based on state law could be allowed in a situation in which the deprivation of the federal rights caused death.

In *Carlson v. Green*, 446 U.S. 14, 24 (1980), the Court held that whenever the relevant state survival statute would abate a Bivens-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action. This Court would not have to fashion a Bivens-type action in the instant matter to provide section 1983 with the necessary *remedial assistance.* Congress, by enacting section 1983, provided federal courts all they need to award damages against state officials who violate an individual's constitutional rights. It would be hard to imagine a right without a remedy. *Monroe v. pape*, 365 U.S. 167 (1961), stands for the proposition that if the Fourteenth Amendment protects you, then section 1983 provides the engine for damages.

It seems clear that the plaintiff has alleged a protected constitutional right and section 1983 would provide the necessary remedy to allow recovery.

Another word or two before I go. The decision reached herein does not provide an invitation to bring an ever-increasing flood of section 1983 actions where no grievance seems too trivial to escape being translated into a constitutional claim. The claim involved herein is one arising out of a parent-child relationship. With all due respect to the learned opinion of Judge Moore in *Jackson v. Marsh, supra*, I cannot agree that this decision requires a proverbial "quantum leap". In this case there is no group of beneficiaries from which to make a choice; only a parent would have standing. In many areas the Constitution waits a long time before it is called upon to act. The lack of cases brought before the Courts to determine whether a parent

has an independent cause of action under the Constitution for the loss of a child is no indication that the right does not exist.

Finally, it is not effective deterrence that requires recognition of a right of action in the parent as the decedent's children have an action for wrongful death against the defendants. Here, a different type of personal interest is asserted; i.e., one based on parenthood, and once it is determined that this is a constitutionally protected interest, a remedy must necessarily follow that right. The remedy provided by section 1983 cannot be considered lacking as the claim based on parenthood is similar enough to wrongful death claims that courts should have little trouble in developing criteria for compensation.

Therefore, the Court VACATES its previous ruling and the individual claims of the plaintiff, Eula Mae Logan, are REINSTATED. An appeal may be taken from this order under 28 U.S.C. § 1292(b), provided, however, that an application for appeal shall not stay proceedings in this Court.

Opelousas, Louisiana, October 18, 1983.

/S/ JOHN M. SHAW
JOHN M. SHAW
UNITED STATES DISTRICT JUDGE

NO. 83-1068

Office - Supreme Court, U.S.
FILED
MAR 14 1984
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

LLOYD SPENCER, THE CITY OF BREAUX BRIDGE THE POLICE DEPARTMENT OF THE CITY OF BREAUX BRIDGE, GEORGE MENARD, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE OF THE POLICE DEPARTMENT FOR THE CITY OF BREAUX BRIDGE, VERNON "SUKIT" BLANCHARD, ANTHONY "TANNY" HERBERT, JOSEPH "JOE" JONES, EARL G. HOLLIER AND RAY BROUSSARD, IN THEIR OFFICIAL CAPACITY AS COUNCILMEN FOR THE CITY OF BREAUX BRIDGE, LOUISIANA

Petitioners,

vs.

EULA MAE LOGAN, INDIVIDUALLY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Eugene Barriffe, Jr.
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QUESTIONS PRESENTED

1. Whether the killing of a child, without due process of law, deprives the parent of a fundamental constitutional right.

2. Whether a parent who has been deprived of a parenthood interest in the life of her child by state action without due process of law has an independent right of redress under 42 U.S.C. §1983.

3. Whether a parent has standing to sue for damages under 42 U.S.C. §1983 for the interference with her parenthood interest in the life of her child.

4. Whether the right of a parent to sue for deprivation of this parenthood interest is contingent upon her status under the wrongful death statute of the state in which the injury occurred.

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NO. 83-1068

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LLOYD SPENCER, THE CITY OF BREAUX BRIDGE THE POLICE DEPARTMENT OF THE CITY OF BREAUX BRIDGE, GEORGE MENARD, IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE OF THE POLICE DEPARTMENT FOR THE CITY OF BREAUX BRIDGE, VERNON "SUKIT" BLANCHARD, ANTHONY "TANNY" HERBERT, JOSEPH "JOE" JONES, EARL G. HOLLIER AND RAY BROUSSARD, IN THEIR OFFICIAL CAPACITY AS COUNCILMEN FOR THE CITY OF BREAUX BRIDGE, LOUISIANA

Petitioners,

vs.

EULA MAE LOGAN, INDIVIDUALLY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Eula Mae Logan, respectfully requests that this Court deny the petition of Lloyd Spencer, the City of Breaux Bridge, the Police Department of the City of

Breaux Bridge, George Menard, in his official capacity as Chief of Police of the Police Department for the City of Breaux Bridge, Vernon "Sukit" Blanchard, Anthony "Tanny" Hebert, Joseph "Joe" Jones, Earl G. Hollier and Ray Broussard in their official capacity as Councilmen for the City of Breaux Bridge, Louisiana, for a Writ of Certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on August 11, 1983, and of the judgment and opinion of the United States District Court for the Western District of Louisiana, entered on October 18, 1983.

OPINIONS BELOW

The unpublished opinions and orders of the United States District Court for the Western District of Louisiana are accurately reproduced in petitioners' Appendices C, D and E.

The opinion and judgment of the United States Court of Appeals, Fifth Circuit, *Logan v. Hollier*, 711 F.2d 690 (5th Cir. 1983), and the order denying a petition for rehearing are accurately reproduced in petitioners' Appendices A and B.

The amended ruling of the United States District Court for the Western District of Louisiana, rendered January 6, 1984, appears in Appendix A of this brief.

JURISDICTION

This Court has jurisdiction of this case pursuant to 28 U.S.C. §1254(1) to consider whether to review the opinion of the United States Court of Appeals for the Fifth Circuit. Respondent avers, however, that the opinion and

ruling of the United States District Court for the Western District of Louisiana rendered on October 18, 1983, and amended on January 6, 1984, is not a case "in the courts of appeals", as required by the above cited statute since the United States Court of Appeals for the Fifth Circuit has not yet granted the petitioners' motion to appeal pursuant to 28 U.S.C. §1292(b). Moreover, as discussed below, respondent respectfully avers that this is not a case which appropriately falls into any of the categories of Rule 17, Rules of the Supreme Court of the United States, for which this court exercises its discretion to review. While the claim here presented does involve important questions of federal law, the rulings of the lower courts are consistent with the intent of 42 U.S.C. §1983 and the jurisprudence defining those rights for which a plaintiff may seek redress under the statute.

STATUTORY PROVISIONS INVOLVED

Respondent Logan (hereinafter plaintiff) admits that this case involves the following statutes of the United States: 42 U.S.C. §1983 and 42 U.S.C. §1988. Respondent respectfully avers that this claim does not involve La. Civ. Code Article 2315.

STATEMENT OF THE CASE

This is an action seeking damages under 42 U.S.C. §1983 and §1985 for the death of Glenda John Louis on March 10, 1981. The respondent, Eula Mae Logan, the mother of Ms. John Louis, filed the complaint in her individual capacity; as administratrix of the decedent's estate; and as tutor of the five surviving children of the decedent, seeking damages under federal law for the wrongful death

of Glenda John Louis.[1] In addition to the claims for the wrongful death of Glenda John Louis, the complaint, as amended, alleged that Eula Mae Logan, as mother of the deceased, had been deprived of her constitutional rights, particularly her right to parenthood. It is this claim of Eula Mae Logan, in her individual capacity, for damages under federal law for interference with her parenthood interest in the life of her child, which is at issue in this writ application.

The complaint alleges that Glenda John Louis was shot and fatally wounded while in attendance at a political rally in Breaux Bridge, Louisiana. The shot was alleged to have been fired by one of two police officers of the Breaux Bridge Police Department who were investigating the report of a disturbance at the rally. In the amended complaint, it was also alleged that the City of Breaux Bridge, the Breaux Bridge City Council and the Breaux Bridge police chief were grossly negligent in pursuing a policy of appointing unqualified persons as police officers and in failing to provide adequate training, supervision and discipline to the members of the police department.

The defendants moved to dismiss the individual claims of Eula Mae Logan on the ground that any claim by the mother was foreclosed under the Louisiana wrongful death statute. The district court granted defendants' motion and dismissed Eula Mae Logan's claim under both federal and state law. Plaintiff filed a motion for reconsideration of the ruling dismissing her federal claim. After rehearing, the district court affirmed the earlier decision. On February 22, 1982, judgment was signed

[1] In the original complaint, the decedent's last name was mispelled as Jean Lewis. An amended complaint corrected the name to its proper spelling of John Louis.

pursuant to Federal Rules of Civil Procedure 54(b), dismissing Eula Mae Logan's individual claim. (Petitioners' Appendix D)

Ms. Logan appealed the dismissal of her claim to the United States Court of Appeals for the Fifth Circuit. On August 11, 1983, the Court of Appeals rendered its judgment, vacated the district court ruling and remanded the case for a decision as to the viability of plaintiff's claim under federal law (Petitioners' Appendix A). Defendants then applied for rehearing which was denied on September 26, 1983. On October 18, 1983, the district court issued a memorandum ruling vacating its prior ruling and reinstating the individual claims of the plaintiff.

Defendants filed a petition for permission to appeal in the United States Court of Appeals for the Fifth Circuit on October 21, 1983, wherein they indicated their intent to preserve their right to appeal while seeking a writ of certiorari in this Court. The Fifth Circuit denied permission and remanded the case to the district court for an amendment of the order to include the statements required by 28 U.S.C. §1292(b). On January 6, 1984, the district court amended its ruling to certify that the ruling met the criteria of 28 U.S.C. §1292(b) (Respondent's Appendix A). Defendants then resought permission to appeal and the motion was presented for ruling on January 24, 1984. As of the date of this filing, the Fifth Circuit has not ruled on the motion.

REASONS FOR DENYING THE PETITION

I. THE OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, WHICH VACATED AND REMANDED THE CASE TO THE DISTRICT COURT, WAS AN INTERLOCUTORY JUDGMENT WHICH DEFINED THE CORRECT ANALYTICAL FRAMEWORK FOR CONSIDERATION OF THE INDIVIDUAL CLAIMS OF EULA MAE LOGAN.

The Fifth Circuit remanded this case to the district court for a determination as to whether Eula Mae Logan has a cause of action under the Constitution and §1983 for the wrongful death of her daughter, Glenda John Louis, independent of the Louisiana wrongful death statute. This judgment is not dispositive of any issues and the appellate court pointedly refrained from expressing an opinion as to the ultimate resolution of the inquiry on remand.

The opinion, in effect, recognized that the district court, in dismissing the plaintiff's claim, had considered it only in terms of the beneficiary ranking of the Louisiana wrongful death statute and had pretermitted any decision as to whether a parent's liberty interest in continued parenthood is directly cognizable under §1983 and the United States Constitution. As such, this opinion and its judgment do not present an appropriate basis for the exercise of this Court's supervisory jurisdiction as set forth in Rule 17, Rules of the Supreme Court of the United States.

II. THE MEMORANDUM RULING OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, RENDERED OCTOBER 18, 1983, IS TOTALLY CONSISTENT WITH PRIOR PRONOUNCEMENTS OF THIS COURT AND WITH THE INTENT AND PURPOSES OF 42 U.S.C. §1983.

The district court, in its memorandum ruling, stated that it would be hard to imagine a right without a remedy since *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) stands for the proposition that if the Fourteenth Amendment protects you, then §1983 provides the engine for damages.

Having thus reasoned, the court concluded that the plaintiff has alleged a protected constitutional right and §1983 would provide the necessary vehicle to allow recovery. This finding is entirely consistent with this Court's longstanding acknowledgement of the constitutional protection afforded the interest of a parent in the companionship, care, custody and management of his or her child. *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). As the district court correctly noted, it requires no quantum leap to find that the constitutionally protected parental interest includes an interest in the continued life of the offspring. This result had already been hinted at by this Court in *Jones v. Hildebrandt*, 432 U.S. 183, 97 S.Ct. 2283, 53 L.Ed.2d 209 (1977).

Respondent avers, therefore, that this decision embraces no new and unsettled principle of federal law which would recommend itself to closer scrutiny by this Court.

a. This claim requires no reference to state law under §1988.

Petitioners have persistently misframed the claim asserted by the plaintiff as being that of a person seeking to recover damages for the deprivation of another person's right. This is an incorrect statement of the plaintiff's cause of action. The right which Ms. Logan asserts is her own right. She seeks redress for the injury to her liberty interest in continued parenthood which is a right of constitutional dimensions. 42 U.S.C. §1983 provides to any citizen deprived of a constitutional right, a vehicle for redress. The plaintiff has been deprived of a constitutional right. She can, therefore, seek redress under that statute. Her cause for redress is one arising directly under §1983. It is not merely an issue arising in the context of a federal civil rights action which existing federal law does not cover, and which necessitates reference to state law, as was explained by this Court in *Moor v. County of Alameda*, 411 U.S. 693, 93 S.Ct. 1785, 36 L.Ed.2d 596 (1973). Indeed, if any state law did exist which would serve to deprive the plaintiff of her cause of action under §1983, such a law would be inconsistent with the Constitution of the United States and, thus, inapplicable under the provisions of §1988.

Petitioners rely heavily on the opinion of this Court in *Robertson v. Wegmann*, 436 U.S. 584, 98 S.Ct. 1991, 56 L.Ed.2d 554 (1978) for their contention, which they interpret to be the meaning of that decision, that state law must be used to fashion a remedy for constitutional deprivations as long as it is not inconsistent with the purposes behind the Constitution and laws of the United States. This reliance is misplaced. *Wegmann, supra*, dealt with a situation unprovided for by federal law. (The question was whether a §1983 claim abated with the death of the claimant when there was no person left to claim as a beneficiary under the state survival-wrongful death scheme.) The claim asserted by the present plaintiff does not pose an unprovided for

situation under federal law. §1983 affords a right of redress. State law is to be invoked only when the federal law is deficient. Such is not the case here.

b. Eula Mae Logan is a party with standing to assert a claim under 43 U.S.C. §1983.

Petitioners have repeatedly argued the issue of standing, contending that state law must be consulted to determine whether a plaintiff has standing to sue for his own damages resulting from the death of another. In support thereof, they cite *Smith v. Wickline*, 396 F.Supp. 555 (W.D. Okla. 1975); *Pollard v. United States* 384 F.Supp. 304 (M.D. Ala. 1974); *Galindo v. Brownell*, 255 F.Supp. 930 (S.D. Cal. 1966). None of these cases dealt with a parent attempting to assert an action under the Constitution and §1983, and independent of the state wrongful death statutes, for an injury sustained as the result of the death of a child. They did not address themselves to a claim such as that presented by this plaintiff and they are not persuasive. *Mattis v. Scharr*, 502 F.2d 588 (8th Cir. 1974) is also cited by the petitioners. *Mattis*, however, involved a suit for declaratory relief; the plaintiff did not appeal his claim for damages. The court, therefore, did not consider the issue of standing as it is presented in the instant claim.

Respondent avers that she has standing to bring this claim. She has suffered an injury to a personal, constitutionally protected right: she has been deprived of a liberty interest in the continued life of her child. It would be ludicrous to demand that she refer to state statute to determine if she was sufficiently affected by that injury to state a cause of action for damages.

CONCLUSION

In conclusion then, plaintiff reiterates her contention that the rulings of the district court and of the court of appeals are fully consistent with prior pronouncements of this Court, with the intent and purposes of 42 U.S.C. §1983 and with the jurisprudential interpretations thereof. The lower court opinions present no radical departure from established doctrine. Plaintiff respectfully urges, therefore, that this Court deny the application for writ of certiorari as not warranting the exercise of its supervisory jurisdiction.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I, Eugene Barriffe, Jr., one of the counsel for the respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify, that on the ____ day of March, 1984, I served three copies of the Brief in Opposition to Petition for Writ of Certiorari on each of the several parties hereto, as follows:

1. On the petitioners by mailing three copies in a properly addressed envelope, first class postage prepaid, to their counsel of record:

R. Gordon Kean, Jr.
Charles S. McCowan, Jr.
Pamela C. Walker
P.O. Box 3513
Baton Rouge, Louisiana 70821

2. On defendant, Dan Hollier, by mailing three copies in a duly addressed envelope, with first class postage prepaid, to his counsel of record:

James L. Pate
Southwest National Bank Building
Suite 700
102 Versailles Boulevard
P.O. Drawer 3507
Lafayette, Louisiana 70502

It is further certified that all parties required to be served have been served, and that the list of such parties is as set forth above.

Eugene Barriffe, Jr., Attorney for plaintiff,
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APPENDIX "A"

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE-OPELOUSAS DIVISION

CIVIL ACTION NUMBER 810559
SECTION S

EULA MAE LOGAN, ET AL

VS.

DAN HOLLIER, ET AL

AMENDED RULING

The last paragraph of the Court's ruling of October 18, 1983 is hereby amended to read as follows:

Therefore, the Court vacates its previous ruling and the individual claims of the plaintiff, Eula Mae Logan, are reinstated. The Court is of the opinion that this ruling involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from this ruling may materially advance the ultimate termination of this litigation. Accordingly, an appeal may be taken from this order under 28 U.S.C. §1292(b), provided, however, that an application for appeal shall not stay proceedings in this Court.

Opelousas, Louisiana, January 6, 1984.

JOHN M. SHAW
UNITED STATES DISTRICT JUDGE